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Monsanto Co. v. Geertson Seed Farms: Irreparable Injury to the National Environmental Policy Act?

Madeline Gwyn

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MONSANTO CO. V. GEERTSON SEED FARMS: IRREPARABLE INJURY TO THE NATIONAL ENVIRONMENTAL POLICY ACT?

ABSTRACT

The Supreme Court recently embarked on a path toward removing the only teeth the National Environmental Policy Act (NEPA) has—its procedural mandates. In Winter v. Natural Resources Defense Council, Inc. and, more recently, in the controversial case Monsanto Co. v. Geertson Seed Farms, the Court declined to issue an injunction against federal agency action despite the agency’s failure to complete an Environmental Impact Statement (EIS) regarding the action, as required by NEPA. The Court reasoned that environmental plaintiffs must show a “likelihood” of environmental harm to meet the irreparable-injury requirement of injunctive relief. Additionally, the Court held that an agency’s failure to complete an EIS, with nothing more, does not establish a likelihood of environmental harm. By declining to issue an injunction, the Court failed to ensure that an EIS would be completed before the federal agency reached a decision or foreclosed less harmful alternatives.

Because of Winter’s and Geertson’s unique facts, the holdings of these cases can be limited. That is, these cases should not be interpreted to espouse the typical approach to a NEPA case. This Comment explains how Winter and Geertson can be interpreted narrowly to harmonize with the well-established precedents of Weinberger v. Romero-Barcelo and Amoco Production Co. v. Village of Gambell, which urge that the purpose of the relevant statute be considered when deciding whether to issue an injunction. The purpose of NEPA—facilitating informed agency decision making—can be effectuated only through the Act’s procedural mandates because the Act has no substantive mandates. Therefore, irreparable injury should be presumed when an agency has violated the Act’s procedural requirements. A showing of environmental harm should be unnecessary. Ultimately, this presumption would put environmental plaintiffs on equal footing with defendants and force agencies to take their obligations under NEPA seriously.

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INTRODUCTION

As one of the first major congressional environmental laws, the National Environmental Policy Act of 1969¹ (NEPA) represents a historical and fundamental shift in how United States policy makers conceptualize the federal government's relationship with the natural environment.² Using sweeping language, NEPA announces its lofty goals "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."³ But in the recent and controversial⁴ decision of *Monsanto Co. v.*

¹ Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4375 (2006 & Supp. IV 2010)).

² See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 229 (5th ed. 2007).

³ 42 U.S.C. § 4331(a).

⁴ See Andrew Pollack, *U.S. Approves Genetically Modified Alfalfa*, N.Y. TIMES, Jan. 28, 2011, at B1; Paul Voosen, *USDA's Alfalfa Decision Postpones Reckoning on Biotech Crops*, N.Y. TIMES (Jan. 28, 2011), <http://www.nytimes.com/gwire/2011/01/28/28greenwire-usdas-alfalfa-decision-postpones-reckoning-on-69218.html?pagewanted=all>.

Geertson Seed Farms, the Supreme Court ignored NEPA's purpose by declining to issue an injunction against an agency in violation of the Act.⁵ As a result, the Court may have significantly weakened the force of NEPA.

Before the enactment of NEPA, the environmental effects of federal agency actions went unrecognized, at least formally.⁶ Now, NEPA commands agencies to consider the potential environmental effects of the vast majority of their decisions.⁷ The importance of this requirement is suggested by its status as NEPA's sole mandate.

Unlike most legislation, NEPA contains no substantive requirements, such as emission limits on a particular pollutant. Rather, it ensures that agencies follow certain procedures before moving forward with major decisions.⁸ Specifically, NEPA requires agencies to prepare formal Environmental Impact Statements (EISs) for proposed actions.⁹ Only after doing so may an agency decide whether to implement the particular action in question.¹⁰

Although NEPA was passed with lofty goals in mind, the Act's lack of substantive requirements means that agencies have some discretion in deciding how much weight to give to the findings uncovered by their EISs.¹¹ Indeed, after the completion of an EIS, an agency only has to "[s]tate what [its] decision was," "[i]dentify all alternatives considered by the agency in reaching its decision," "identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision," and "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not."¹² An agency is not required to abandon a proposed action if the agency's EIS reveals the potential for environmental harm.¹³

⁵ 130 S. Ct. 2743, 2761 (2010).

⁶ See GLICKSMAN ET AL., *supra* note 2, at 229.

⁷ See 42 U.S.C. § 4332(C).

⁸ *Id.*

⁹ *Id.*

¹⁰ 40 C.F.R. § 1506.10(b) (2011) ("No decision on the proposed action shall be made or recorded . . . by a Federal agency until the later of the following dates: (1) Ninety (90) days after publication of the notice . . . for a draft environmental impact statement. (2) Thirty (30) days after publication of the notice . . . for a final environmental impact statement.").

¹¹ See *id.* § 1505.2(a)-(c).

¹² *Id.*

¹³ See *id.* However, if an EIS uncovers a potential violation of another substantive environmental statute, an agency may have to alter its proposed course of action.

Despite NEPA's lack of substantive requirements, Congress envisioned the Act as a powerful piece of legislation, the procedural requirements of which were meant to be taken seriously.¹⁴ NEPA has proven that it is indeed powerful. Environmental plaintiffs suing for NEPA violations enjoy a success rate of about 44% in district courts and about 32% in circuit courts.¹⁵ The Act has been successfully invoked at least 237 times between 2005 and 2009 alone to require agencies to more thoroughly assess the environmental impacts of a proposed action.¹⁶

Because NEPA consists only of procedural requirements that force agencies to consider the environmental implications of their actions, it follows that these procedures must be completed *before* an agency decides to embark on a specific course of action. If not, NEPA would become a nullity. A simple example serves to illustrate why. Imagine that the Federal Highway Administration (FHWA) approves construction of a major highway, a small portion of which would pass through a vast forest. FHWA then begins its EIS after hiring contractors for the job and consulting with engineers, but before the forest has been touched. FHWA later discovers, through creating its EIS, that the forest is an unadulterated and biologically diverse ecosystem. What should FHWA do now that it already has spent money, time, and other resources on planning this project? Similarly, imagine that an environmental group challenged FHWA's premature approval of the project. Should the reviewing court issue an injunction barring further planning or work on the project until the EIS is completed to prevent the type of problem described above?

The Supreme Court addressed issues similar to these in two recent decisions. This Comment analyzes the Court's trend of becoming less willing to issue injunctions when a violation of NEPA has occurred. This Comment argues that, by allowing an agency to reach, and sometimes even *act on*, its decision before completion of an EIS, the Court is decreasing NEPA's

¹⁴ See 42 U.S.C. § 4332 (stating that the procedural requirements of NEPA must be completed "to the fullest extent possible").

¹⁵ JAY E. AUSTIN ET AL., ENVTL. LAW INST., JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 8-9 (2004), available at <http://www.endangeredlaws.org/pdf/JudgingNEPA.pdf>.

¹⁶ See *NEPA Litigation*, NAT'L ENVTL. POL'Y ACT, http://ceq.hss.doe.gov/legal_corner/litigation.html (follow the 2001 through 2009 "Litigation Survey" hyperlinks) (last visited Feb. 22, 2012). This figure is the result of adding all instances when a court held that an agency's categorical exclusion, Environmental Assessment (EA), or EIS was inadequate; compliance with NEPA was required; or a supplemental EIS was needed. *See id.*

effectiveness and undermining its important purpose of ensuring informed agency decision making. By essentially changing the timeline along which an agency may complete an EIS, the Court may be removing the only teeth that NEPA possesses—its procedural mandates.

Part I of this Comment provides a brief overview of NEPA, including the procedures agencies must follow under the Act. It shows that NEPA is a dead letter when agencies are allowed to reach or act on their decisions before completing EISs. Part I then concludes with an explanation of the standard that courts employ to review an agency's compliance with NEPA and argues that relief provided by courts is the most important NEPA enforcement mechanism.

Part II discusses Supreme Court cases regarding the issuance of injunctions for violations of other environmental statutes. This Part then presents how lower federal courts and the Supreme Court decide whether to issue injunctions for NEPA violations. The Supreme Court's recent decisions in *Winter v. Natural Resources Defense Council, Inc.* and *Monsanto Co. v. Geertson Seed Farms* highlight the trend toward refusing to issue an injunction for the time period during which an agency corrects its NEPA violation. In both cases, the Court required environmental plaintiffs to show a likelihood of environmental harm to meet the irreparable-injury requirement of injunctive relief.

Part III explains how the holdings of *Winter* and *Geertson* can be limited to their unique facts. Because of these unique facts, the approach federal courts should take when confronted with a more typical NEPA case remains unclear. Part III clarifies what the framework for this type of case should be by attempting to harmonize *Winter* and *Geertson* with the Court's well-established precedent in this area of law. Specifically, this Comment argues that a showing of likely environmental harm is superfluous and proposes that irreparable harm be presumed when an agency violates NEPA's procedures. This presumption of irreparable harm necessarily would lead to injunctive relief being granted more readily. Injunctions force agencies to consider the environmental impacts of proposed actions before devoting time, money, or other resources to implementing a desired plan and before more environmentally benign alternatives are foreclosed. Therefore, the issuance of more injunctions would ensure that EISs are completed along the proper timeline.

I. OVERVIEW OF NEPA AND ITS ENFORCEMENT THROUGH JUDICIAL REVIEW

This Part provides a brief overview of NEPA and demonstrates that NEPA is a dead letter when agencies are allowed to reach or act on their decisions before completing EISs. This Part also explains the standard that courts employ to review an agency's compliance with NEPA and argues that relief provided by courts is the most important NEPA enforcement mechanism.

A. *NEPA and Its Goals, Effectuated Through Its Procedures*

One of the goals of NEPA is “[t]o declare a national policy” regarding the environment.¹⁷ Scholars have even called it an “environmental Magna Carta.”¹⁸ Congress enacted NEPA to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.”¹⁹

Congress intended NEPA to establish “action-forcing” procedures²⁰ and exert significant influence on agencies’ decisions²¹ despite its lack of substantive requirements. Otherwise, according to Senator Jackson, who proposed the enactment of NEPA,²² the Act’s “lofty declarations are nothing more than that.”²³ Senator Jackson also stated that the Act provides “approaches to dealing with environmental problems on a preventive and an anticipatory basis.”²⁴ He went on to lament Congress’s history of dealing with environmental problems through remedial efforts only.²⁵ Senator Jackson

¹⁷ 42 U.S.C. § 4321.

¹⁸ See GLICKSMAN ET AL., *supra* note 2, at 229.

¹⁹ 42 U.S.C. § 4321.

²⁰ See 115 CONG. REC. 40,416 (1969) (statement of Sen. Henry M. Jackson) (internal quotation marks omitted).

²¹ See COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 11 (1997) (“Congress envisioned that federal agencies would use NEPA as a planning tool to integrate the environmental, social, and economic concerns directly into projects and programs.”).

²² 115 CONG. REC. 40,415 (1969) (statement of Sen. Henry M. Jackson).

²³ *National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before the S. Comm. on Interior & Insular Affairs*, 91st Cong. 116 (1969) (statement of Sen. Henry M. Jackson, Chairman, S. Comm. on Interior & Insular Affairs).

²⁴ 115 CONG. REC. 40,416 (1969) (statement of Sen. Henry M. Jackson).

²⁵ See *id.* (“As Members of the Senate are aware, too much of our past history of dealing with environmental problems has been focused on efforts to deal with ‘crises,’ and to ‘reclaim’ our resources from past abuses.”).

clearly recognized the importance of agencies examining the potential environmental effects of their decisions *before* taking action.

Congress intended that NEPA's underlying goals be effectuated through the Act's procedural requirements.²⁶ NEPA requires an impact statement for "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."²⁷ While NEPA does not offer any guidance for interpreting this vague statement, the Council on Environmental Quality (CEQ) has promulgated regulations that shed some light on its meaning.²⁸ The CEQ defines "[m]ajor Federal action[s]" as "actions with effects that may be major and which are potentially subject to Federal control and responsibility."²⁹ These actions tend to be either the adoption of "official policy," "formal plans," or "programs," or the "[a]pproval of specific projects."³⁰ The CEQ additionally states that the term "[s]ignificantly," "as used in NEPA[,] requires considerations of both context and intensity," such as the unique conditions of the project's location and whether the project is controversial.³¹ Finally, the CEQ defines "[h]uman environment" as "the natural and physical environment and the relationship of people with that environment."³² As indicated by these definitions, NEPA applies to an extremely broad range of agency actions.

In determining whether an impact statement is required, an agency first must assess whether the proposed action in question is categorically excluded from NEPA.³³ "Categorical exclusions" include federal actions that are not expected to have significant environmental effects.³⁴ For example, the Ninth Circuit held that the National Park Service did not act arbitrarily or capriciously when it determined that the effects of a decision to prohibit bikers from accessing certain trails in a national park, including the resultant crowding of cyclists onto fewer trails, were not environmental effects

²⁶ See *supra* notes 8–16 and accompanying text.

²⁷ National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C) (2006).

²⁸ See 40 C.F.R. § 1508 (2011). The CEQ was granted authority to promulgate such regulations by an Executive Order. Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 25, 1977). Courts defer to the CEQ's interpretation of NEPA. See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (holding that CEQ interpretations of NEPA are "entitled to substantial deference").

²⁹ 40 C.F.R. § 1508.18.

³⁰ *Id.* § 1508.18(b).

³¹ See *id.* § 1508.27(b).

³² *Id.* § 1508.14.

³³ See *id.* § 1508.4.

³⁴ See *id.*

triggering NEPA.³⁵ For actions not categorically excluded, an agency must prepare an Environmental Assessment (EA).³⁶ An EA presents “sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.”³⁷ A Finding of No Significant Impact (FONSI) from an EA means the agency has no further obligations under NEPA and, accordingly, does not need to prepare an EIS.³⁸

The heart of NEPA, section 102, is invoked if an agency determines that an EIS is necessary.³⁹ An EIS is “a detailed statement” disclosing “the environmental impact of the proposed action” and “adverse environmental effects which cannot be avoided should the proposal be implemented.”⁴⁰ In accordance with NEPA’s lofty goals and wide-ranging application, courts have interpreted the term “effects” quite broadly. For example, impacts on an urban environment constitute effects under section 102.⁴¹ In addition, consequences of an action that occur “later in time or farther removed in distance” still warrant consideration.⁴² Even more striking, the CEQ has defined “effects” as “ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”⁴³ “Effects” also includes “those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.”⁴⁴ Agencies also examine their proposed actions’ implications for environmental justice in accordance with an executive order.⁴⁵

³⁵ *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445 app. at 1457 (9th Cir. 1996).

³⁶ 40 C.F.R. § 1501.3. An agency can skip this step by simply deciding to go ahead with a full-fledged EIS. *Id.* § 1501.3(a).

³⁷ *Id.* § 1508.9(a)(1). “[T]he Federal agency shall . . . [b]ased on the environmental assessment make its determination whether to prepare an environmental impact statement.” *Id.* § 1501.4(c).

³⁸ *See id.* § 1508.13.

³⁹ *See* National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006).

⁴⁰ *See id.*

⁴¹ *See, e.g., Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972) (“The Act must be construed to include protection of the quality of life for city residents.”); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 879 (D. Or. 1971) (holding that the Department of Housing and Urban Development must examine the cumulative effects of the development of an apartment building, including the potential loss of an “existing view from certain neighboring properties”).

⁴² 40 C.F.R. § 1508.8; *accord City of Davis v. Coleman*, 521 F.2d 661, 674–77 (9th Cir. 1975).

⁴³ 40 C.F.R. § 1508.8.

⁴⁴ *Id.*

⁴⁵ *See* EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA’S NEPA COMPLIANCE ANALYSES (1998) (noting that Executive Order 12,898 calls on agencies to work toward environmental justice and explaining that certain mandates of the Executive Order are directed at NEPA-related activities). The EPA defines “environmental justice” as “[t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development,

In addition to evaluating the environmental impact and effects of the desired action, an EIS must propose alternative actions.⁴⁶ For example, an EIS must discuss the option of taking no action at all, as well as “[o]ther reasonable courses of action.”⁴⁷ Finally, an EIS must also include a description of “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity” and “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”⁴⁸ All of section 102’s requirements ensure that the scope of an EIS is quite wide.

NEPA also provides the opportunity for public input on a proposed agency decision.⁴⁹ The agency must provide notice of hearings and meetings and make environmental documents available to persons who may be interested or affected.⁵⁰ In many cases, these stakeholders’ participation has proven influential in guiding an agency’s ultimate decision.⁵¹ The public’s comments, along with the EIS and any related documents, eventually are made available to the public at large.⁵²

Notably, the CEQ devotes an entire section of its NEPA regulations to the timing of an EIS.⁵³ The regulations emphasize that an EIS “shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process.”⁵⁴ The regulations also bar an agency from taking any preliminary action which would “[h]ave an adverse environmental impact” or “[l]imit the choice of reasonable alternatives” until the completion of an EIS.⁵⁵ This makes sense given that Congress intended NEPA to impact agency

implementation, and enforcement of environmental laws, regulations, and policies.” *Id.* § 1.1.1 (internal quotation mark omitted).

⁴⁶ See 42 U.S.C. § 4332(C)(iii) (2006).

⁴⁷ 40 C.F.R. § 1508.25(b).

⁴⁸ 42 U.S.C. § 4332(C)(iv)–(v).

⁴⁹ See generally 40 C.F.R. § 1506.6.

⁵⁰ See *id.* § 1506.6(b).

⁵¹ ENVTL. LAW INST., NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT 6 (2010) (“[I]n numerous cases, portions of or entire NEPA alternatives proposed by individuals, municipalities, tribes, organizations and others have been selected by federal agencies as a result of the NEPA review.”).

⁵² See 40 C.F.R. § 1506.6(f). These documents are made available pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

⁵³ 40 C.F.R. § 1502.5.

⁵⁴ *Id.*

⁵⁵ See *id.* § 1506.1(a); see also *id.* § 1506.1(c)(3) (stating that an agency may take an interim action only when it “will not prejudice the ultimate decision on the program”). Similarly, in another section of the

decisions.⁵⁶ The only way for an EIS to have actual influence is if an agency completes the EIS before making a decision that potentially affects the environment and, in making that decision, gives careful consideration to the findings uncovered by the EIS.⁵⁷ That is, to achieve the purpose of NEPA—ensuring informed agency decision making—EISs must “serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”⁵⁸

B. Judicial Review of Agency Compliance with NEPA

The provisions of NEPA do not provide an avenue for judicial review of an agency’s compliance with the Act. However, the CEQ regulations acknowledge that judicial review is available after an agency has filed an EIS or FONSI.⁵⁹ The CEQ regulations similarly state that judicial review is appropriate when an agency has taken action that will result in “irreparable injury.”⁶⁰

In one of the first major NEPA cases, the D.C. Circuit held that “[s]ection 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties.”⁶¹ In addition, the court noted that, “if [an agency’s] decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the *responsibility* of the courts to reverse.”⁶² Other circuits followed the D.C. Circuit’s lead after it held that courts have the authority to review agencies’ compliance with NEPA.⁶³ Judicial review has since become a familiar enforcement mechanism.⁶⁴

regulations, the CEQ declared that “[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision.” *Id.* § 1502.2(f).

⁵⁶ See 115 CONG. REC. 40,416 (1969) (statement of Sen. Henry M. Jackson).

⁵⁷ See COUNCIL ON ENVTL. QUALITY, *supra* note 21, at 11 (“[T]he ‘NEPA process’ is often triggered too late to be fully effective.”).

⁵⁸ 40 C.F.R. § 1502.2(g).

⁵⁹ See *id.* § 1500.3.

⁶⁰ *Id.*

⁶¹ *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

⁶² *Id.* (emphasis added).

⁶³ See Project, *Federal Administrative Law Developments—1972*, 1973 DUKE L.J. 157, 303–04.

⁶⁴ *NEPA Litigation*, *supra* note 16. Between 2001 and 2008, 1035 NEPA cases were filed. *Id.*

When reviewing an agency's general compliance with NEPA, courts apply the arbitrary-and-capricious standard, giving substantial deference to agency decisions.⁶⁵ However, when reviewing an agency's decision not to prepare an EIS or when reviewing the content of an agency's EIS, courts also employ the hard-look doctrine.⁶⁶ That is, courts seek to ensure that the agency undertook "a thorough investigation into the environmental impacts of an agency's action and . . . candid[ly] acknowledg[ed] . . . the risks that those impacts entail."⁶⁷ This means that, while courts defer to decisions within an agency's discretion, courts also "must 'make a searching and careful inquiry into the facts and review whether the decision . . . was based on consideration of the relevant factors and whether there has been a clear error of judgment.'"⁶⁸

The role of the federal courts is vital to the proper functioning of NEPA⁶⁹ because neither NEPA nor the CEQ regulations specify any consequences that will befall an agency should it ignore NEPA's requirements. Also, unlike many environmental statutes, NEPA is not enforced by an administering executive branch agency.⁷⁰ The power of federal courts to review agency actions therefore provides the only NEPA enforcement mechanism.

When a court determines that an agency has failed to meet its obligations under NEPA, it must fashion a remedy. The remedy of an injunction is particularly appropriate in the case of a NEPA violation. This equitable relief ensures that an agency cannot take any action before completing an EIS so that available alternatives are not foreclosed and the EIS is not biased.

Across all areas of law, federal courts apply a traditional four-factor test to determine whether an injunction should issue.⁷¹ For an injunction to issue, a court must find that (1) the plaintiff will suffer irreparable injury absent an

⁶⁵ See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989) (holding that review of the U.S. Army Corps of Engineers' determination that its EIS need not be supplemented "is controlled by the 'arbitrary and capricious' standard"); see also Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006) ("[A] reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

⁶⁶ See Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1154–56 (2001); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁶⁷ *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005).

⁶⁸ *Id.* (alteration in original) (quoting *Hodges v. Abraham*, 300 F.3d 432, 445 (4th Cir. 2002)).

⁶⁹ AUSTIN ET AL., *supra* note 15, at 4, 12 (noting that "the judicial branch's administration of NEPA is of great importance and effect" and is "as important as ever").

⁷⁰ *Id.* at 4.

⁷¹ See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

injunction, (2) the plaintiff is likely to succeed on the merits, (3) the balance of the equities as to both parties weighs in the plaintiff's favor, and (4) the public interest weighs in the plaintiff's favor.⁷² An injury traditionally has been considered irreparable when it cannot be addressed by legal remedies.⁷³ A legal remedy such as ex post damages would not provide redress for NEPA plaintiffs because the harm NEPA seeks to avoid would have already occurred.⁷⁴ Monetary damages cannot undo an uninformed and biased agency decision-making process.

As we have seen, judicial review provides the only effectual means of forcing agency compliance with NEPA. An injunction proves the appropriate remedy for an agency's violation of NEPA because it ensures that the agency does not reach a decision before completing an EIS.

II. THE HISTORY OF ISSUING INJUNCTIONS FOR VIOLATIONS OF ENVIRONMENTAL STATUTES, WITH A FOCUS ON NEPA

This Part discusses Supreme Court cases regarding the issuance of injunctions for violations of environmental statutes generally and then describes how lower federal courts and the Supreme Court decide whether to issue injunctions for NEPA violations specifically. This Part then explains the Supreme Court's recent decisions in *Winter v. Natural Resources Defense Council, Inc.* and *Monsanto Co. v. Geertson Seed Farms*. In both cases, the Court required environmental plaintiffs to show a likelihood of environmental harm to meet the irreparable-injury requirement of injunctive relief.

A. *Issuing Injunctions for Violations of Environmental Statutes Other than NEPA: Looking to the Purpose of the Statute*

In the area of environmental law, the Supreme Court and lower federal courts have developed specific standards to be considered when applying the traditional four-factor test for injunctive relief. In 1978, the Court wrote perhaps its most remarkable opinion about granting equitable relief to prevent

⁷² See *id.*

⁷³ See, e.g., *Va. Petrol. Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.")

⁷⁴ See Sarah W. Rubenstein, *Injunctions Under NEPA After Weinberger v. Romero-Barcelo and Amoco Production Co. v. Village of Gambell*, 5 WIS. ENVTL. L.J. 1, 3 (1998).

a violation of an environmental statute in *TVA v. Hill*.⁷⁵ This case dealt with a substantive, rather than procedural, violation of the Endangered Species Act of 1973.⁷⁶ Yet it is relevant because it illustrates that, historically, the Court has given much respect to the purpose of the relevant statute when deciding whether an injunction should issue. In *Hill*, the Court enjoined further work on construction of a virtually completed dam because it would have destroyed the habitat of an endangered species: the three-inch-long snail darter.⁷⁷ The Court recognized that, to some, this injunction may seem “curious” or “paradox[ical]”; however, the Court defended its decision, noting that “the language, history, and structure of the legislation under review” indicated Congress’s intent to afford protection to endangered species at all costs.⁷⁸ *Hill* shows the importance of a statute’s purpose when a court is considering whether to grant equitable relief.

Four years later, the Supreme Court first addressed whether to issue an injunction for a procedural violation of an environmental statute in *Weinberger v. Romero-Barcelo*.⁷⁹ That case involved the Federal Water Pollution Control Act⁸⁰ (FWPCA), which requires entities discharging pollution into the nation’s waters to obtain a permit.⁸¹ Unlike NEPA, the FWPCA also sets forth substantive requirements, including limitations on the amounts of specific pollutants discharged by any particular entity.⁸² The First Circuit found that the Navy had violated the FWPCA by discharging ordnance into water surrounding Vieques Island without a permit and, accordingly, enjoined the Navy from further discharging ordnance until a permit was obtained.⁸³

However, after applying the traditional factors for granting equitable relief, the Supreme Court reversed.⁸⁴ First, the Court noted that “the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.”⁸⁵ The Court therefore placed great weight on

⁷⁵ 437 U.S. 153 (1978).

⁷⁶ *See id.* at 171–72 (construing Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2006))).

⁷⁷ *Id.* at 172–73.

⁷⁸ *See id.* at 172, 174.

⁷⁹ 456 U.S. 305, 306–07 (1982).

⁸⁰ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387).

⁸¹ 33 U.S.C. §§ 1311(a), 1323(a).

⁸² *Id.* §§ 1341, 1362.

⁸³ *Weinberger*, 456 U.S. at 307, 310.

⁸⁴ *Id.* at 312–21.

⁸⁵ *Id.* at 312.

the fact that “[a]n injunction [was] not the only means of ensuring compliance” with the FWPCA— “[t]he [Act] itself . . . provides for fines and criminal penalties.”⁸⁶ Next, the Court recognized that it must balance the equities to “arrive at a ‘nice adjustment and reconciliation’ between the competing claims.”⁸⁷ Also important to the Court’s analysis were the “public consequences in employing the extraordinary remedy of injunction.”⁸⁸ Here, the public interest was not threatened because no environmental harm was occurring.⁸⁹

Most important to the Court, though, was the purpose of the FWPCA, which is to preserve the integrity of the nation’s waters, rather than to ensure compliance with the permit process.⁹⁰ In this instance, the Navy’s actions had not caused pollution of the waters and had not violated any of the FWPCA’s substantive requirements.⁹¹ Therefore, declining to issue an injunction would not undermine the purpose of the Act.⁹² Accordingly, the Court held that enjoining the Navy’s activity was inappropriate in this instance.⁹³

Five years later, the Court revisited whether to issue an injunction for a procedural violation of an environmental statute in *Amoco Production Co. v. Village of Gambell*.⁹⁴ That case involved the Alaska National Interest Lands Conservation Act⁹⁵ (ANILCA), which requires federal agencies to evaluate the effect of potential land leases on the use of that land by Native Americans for subsistence purposes.⁹⁶ Unlike NEPA, ANILCA sets forth substantive requirements meant to guide an agency’s decision-making process after the agency has performed the requisite evaluation.⁹⁷ The Ninth Circuit found that

⁸⁶ *Id.* at 314.

⁸⁷ *Id.* at 312 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

⁸⁸ *See id.* (citing *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 500 (1941)).

⁸⁹ *Id.* at 315, 320.

⁹⁰ *See id.* at 314 (citing 33 U.S.C. § 1251(a) (2006)).

⁹¹ *Id.* at 309.

⁹² *Id.* at 315.

⁹³ *Id.* at 311.

⁹⁴ 480 U.S. 531, 534 (1987).

⁹⁵ Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16, 42, and 43 U.S.C.).

⁹⁶ Alaska National Interest Lands Conservation Act § 810(a), 16 U.S.C. § 3120(a) (2006).

⁹⁷ *See id.* Section 810 of ANILCA states:

No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency— . . . determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands,

the Secretary of the Interior had violated ANILCA by authorizing the lease of certain land parcels to oil and gas companies before performing an evaluation of effects on subsistence resources.⁹⁸ The Ninth Circuit thus enjoined further use of the leases.⁹⁹

The Supreme Court held that the Ninth Circuit erred when it granted an injunction.¹⁰⁰ To reach this conclusion, the Court used the traditional factors of equitable relief.¹⁰¹ When considering each factor, the Court focused on the purpose of the relevant statute, as it did in *Romero-Barcelo*.¹⁰² First, the Court noted that “the bases for injunctive relief are irreparable injury and inadequacy of legal remedies.”¹⁰³ The Court rejected the Ninth Circuit’s contention that “[i]rreparable damage is *presumed* when an agency fails to evaluate thoroughly the environmental impact of a proposed action.”¹⁰⁴ The Court thus answered in the negative the threshold question of whether a procedural violation of ANILCA was enough to constitute irreparable injury. Instead, the Court held that there was no irreparable injury in this case because the leases would have no significant effect on subsistence resources, meaning they would not violate ANILCA’s substantive requirements.¹⁰⁵ Thus, the withholding of an injunction would not undercut the relevant statute’s overarching purpose—the preservation of natural resources relied on for subsistence purposes.¹⁰⁶

Next, the Court recognized that the interests of the competing parties ought to be considered.¹⁰⁷ The Court found that an injunction would harm the lessees,

(B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Id. Justice White noted that “[s]ection 810 does not prohibit all federal land use actions which would adversely affect subsistence resources but . . . provides that actions which would significantly restrict subsistence uses can only be undertaken if they are necessary and if the adverse effects are minimized.” *Amoco Prod. Co.*, 480 U.S. at 544.

⁹⁸ *Amoco Prod. Co.*, 480 U.S. at 534.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 546.

¹⁰¹ *See id.* at 542.

¹⁰² *Id.* at 544.

¹⁰³ *Id.* at 542.

¹⁰⁴ *Id.* at 544–45 (alteration in original) (quoting *Gambell v. Hodel*, 774 F.2d 1414, 1423 (9th Cir. 1985), *rev’d in part, vacated in part sub nom. Amoco Prod. Co.*, 480 U.S. 531) (internal quotation marks omitted).

¹⁰⁵ *See id.* at 545.

¹⁰⁶ *See id.* at 544–45.

¹⁰⁷ *See id.* at 545.

who had already committed \$70 million to exploration of the land.¹⁰⁸ Accordingly, the balance of the equities weighed in the lessees' favor. Turning to the public interest at stake, the Court noted that, although the preservation of subsistence resources was a relevant public interest, nothing in the statute expressed a congressional intent that subsistence uses should always trump other public interests.¹⁰⁹ In this case, the Court decided that the development of energy resources was a more important public interest.¹¹⁰ Having considered all the factors, the Court decided an injunction was inappropriate in this instance.¹¹¹

However, in an important dictum, the Court stated, "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."¹¹² Accordingly, while the Court had no reason to think environmental harm would result from the continuance of the particular land lease in *Amoco Production Co.*, the Court left open the possibility that almost any environmental harm would constitute irreparable injury in other cases. The Court went on to say that, when environmental harm is "sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction."¹¹³

Romero-Barcelo and *Amoco Production Co.* mark the beginning of the Court's jurisprudence regarding the issuance of injunctions for procedural violations of environmental statutes. In both cases, the Court gave substantial weight to the overarching purpose of the relevant act. Each act's purpose was accomplished through not only procedural standards but also substantive requirements. Therefore, the Court viewed the procedures of each act—the permit process pursuant to FWPCA and the evaluation of potential land leases pursuant to ANILCA—as relatively less important because they were merely a means to an end. However, unlike FWPCA and ANILCA, NEPA contains *only* procedural requirements. The procedures provide the sole mechanism through which NEPA's purpose—ensuring informed agency decision making—can be achieved. Accordingly, the Court should give substantial weight to NEPA's procedures when deciding whether to issue an injunction after an agency violates the Act.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 545–46.

¹¹⁰ *See id.*

¹¹¹ *Id.* at 546.

¹¹² *Id.* at 545.

¹¹³ *Id.*

B. Issuing Injunctions for Violations of NEPA

1. Lower Federal Courts' Jurisprudence: What Is the Purpose of NEPA?

Lower federal courts read the opinions of *Romero-Barcelo* and *Amoco Production Co.* to apply to NEPA cases.¹¹⁴ Thus, these courts apply the traditional four-factor test,¹¹⁵ albeit in different ways,¹¹⁶ when deciding whether an injunction should issue until an agency corrects its NEPA violation.

Some lower federal courts have correctly interpreted these two cases to mean a court should look to the purpose of NEPA when deciding whether an injunction should issue. The First Circuit's case law provides a good example. That Circuit does not define the purpose of NEPA as the prevention of possible environmental harm but rather as a tool to influence agencies' decision-making processes.¹¹⁷ Thus, a violation of NEPA, even absent a showing of imminent or future environmental harm, constitutes irreparable injury.¹¹⁸ This makes sense given that NEPA has no substantive mandates and thus loses all potency if an impact statement is not completed before an agency decides whether to proceed with a proposed project.¹¹⁹ The First Circuit has also pointed out that it

¹¹⁴ The Supreme Court had not answered the precise question of whether injunctions should issue for NEPA violations until after *Amoco Production Co.* Accordingly, *Amoco Production Co.* and *Romero-Barcelo* were the only controlling cases. The Court had, however, discussed the issue in dictum prior to *Romero-Barcelo*. See *Kleppe v. Sierra Club*, 427 U.S. 390, 407 (1976). In *Kleppe v. Sierra Club*, the Court of Appeals for the D.C. Circuit held that irreparable harm occurs when an impact statement pursuant to NEPA is due but not filed. *Id.* Although the Supreme Court ultimately found an injunction to be inappropriate for reasons not relevant here, the Court did not reject this definition of irreparable harm. *Id.*

¹¹⁵ See, e.g., *Town of Huntington v. Marsh*, 884 F.2d 648, 651 (2d Cir. 1989) (citing *Amoco Prod. Co.*, 480 U.S. at 542, and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)) (noting that the "general equitable standards for the issuance of injunctions in the area of environmental statutes" are irreparable injury and the inadequacy of legal remedies, and applying them to a NEPA case).

¹¹⁶ See generally Rubenstein, *supra* note 74, at 13–17 (describing the ways in which lower federal courts have applied the traditional four-factor test in NEPA cases).

¹¹⁷ See, e.g., *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983). The Seventh Circuit conceptualizes the purpose of NEPA in a similar way. See *Wisconsin v. Weinberger*, 745 F.2d 412, 426 (7th Cir. 1984) ("[T]he goal of NEPA is to force agencies to consider the environmental consequences of major federal actions."). The Seventh Circuit thus defined irreparable injury as an agency's predisposal to a particular outcome due to investment in a project prior to preparation of an impact statement. *Id.* at 426–27 (citing *Watt*, 716 F.2d at 952–53). In doing so, the Seventh Circuit recognized the importance of an EIS's timing.

¹¹⁸ *Watt*, 716 F.2d at 952–53 (holding that irreparable injury would occur if an oil lease were not enjoined and if a court were to later determine that a supplemental EIS was required).

¹¹⁹ *Id.* at 952 ("It is appropriate for the courts to recognize [a procedural violation of NEPA as injury], for it reflects the very theory upon which NEPA is based—a theory aimed at presenting governmental decision-makers with relevant environmental data *before* they commit themselves to a course of action.").

does not consider this irreparable injury to be a “procedural” harm.¹²⁰ Rather, the harm lies in the *risk* to the environment that occurs when an agency fails to consider potential environmental ramifications of its proposed action.¹²¹

Importantly, the First Circuit’s understanding of irreparable injury does not mean an injunction is presumed when a NEPA violation has occurred—the balancing process still could lead to the conclusion that an injunction is inappropriate in certain cases, depending on how the remaining three factors tip the scale.¹²² This ensures that, even though environmental plaintiffs enjoy a low threshold for proving irreparable injury, absurd results will be avoided because a court must consider the other factors of the traditional test.

The First Circuit recognizes the difference between the injuries posed by a violation of a part-procedural, part-substantive environmental statute, like ANILCA, and a purely procedural statute, such as NEPA.¹²³ Imagine an agency that, after violating ANILCA’s procedural requirements, goes forward with a project that also violates its substantive requirements. To comply with ANILCA’s substantive requirements, that agency would be required to reverse whatever steps it had already taken regardless of the amount of time or resources dedicated to the project.¹²⁴ Now imagine an agency that fails to prepare an EIS but makes a decision and embarks on a course of action anyway. Because NEPA contains no substantive mandates, an agency would not be required by the Act itself to abort the current project and choose a different course, even if the agency action turns out to be environmentally harmful.¹²⁵ The most a court could do is pause the agency action while an EIS is prepared and considered.¹²⁶ Ultimately, though, the agency still could go through with its initial decision.¹²⁷ Indeed, this would be likely because the agency already would have invested time and resources in the project.¹²⁸ Thus, the “risk” to the environment described by the First Circuit¹²⁹ is a risk in every

¹²⁰ *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (internal quotation marks omitted).

¹²¹ *Id.*

¹²² *Id.* at 504.

¹²³ *See id.* at 503–04.

¹²⁴ *See id.* at 503.

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 500 (“[T]he harm consists of the added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis . . . of the likely effects of their decision upon the environment.”).

sense of the word—NEPA provides no protection whatsoever from an agency that ignores the Act’s procedures.¹³⁰

In contrast to the First Circuit, other lower federal courts, including those of the Ninth Circuit, take a slightly different approach when deciding whether to issue an injunction. In *National Parks & Conservation Ass’n v. Babbitt*, the Ninth Circuit stated, “Where an EIS is required, allowing a *potentially environmentally damaging* project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement.”¹³¹ From this conceptualization of NEPA’s purpose, it follows that irreparable injury is found only when an agency fails to follow the Act’s procedures *and* the agency’s proposed project poses an actual threat to the environment.¹³² However, in meeting this second requirement, the Ninth Circuit requires only that environmental plaintiffs show the “possibility” of environmental harm at any point during the implementation of the project.¹³³ This has proven to be a relatively low threshold—the early stages of a project may be enjoined, even if not environmentally harmful, if at a later stage the project may create a threat to the environment.¹³⁴ Thus, the outcomes of most cases presented to the Ninth

¹³⁰ This is why judicial review and the issuance of injunctions are so vital to enforcement of NEPA. See discussion *supra* Part I.B.

¹³¹ 241 F.3d 722, 737 (9th Cir. 2001) (emphasis added), *abrogated by* *Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (2009), *rev’d sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *accord* *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (“The balance of equities and the public interest favor issuance of an injunction because allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA.”).

¹³² See *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006) (holding that potential harm to several bird species and the potential unnecessary cutting of trees constituted irreparable injury), *overruled in part by* *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008); see also *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988) (describing irreparable harm as “threatened harm to the environment, including . . . cultural, social and economic cost[s]”).

¹³³ *Earth Island Inst.*, 442 F.3d at 1177 (requiring “the possibility of irreparable injury” (internal quotation marks omitted)).

¹³⁴ See, e.g., *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 326 (9th Cir. 1975) (upholding a district court’s grant of an injunction against further approval or commitment of federal funds for certain airport development projects because construction pursuant to the overall airport expansion program may be environmentally damaging). While *Friends of the Earth* was decided before *Weinberger v. Romero-Barcelo*, district courts in the Ninth Circuit continue to cite *Friends of the Earth* and even quote its language recognizing that irreparable injury can be presumed from a NEPA violation. See, e.g., *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110, 1122 (D. Haw. 2000) (citing *Friends of the Earth*, 518 F.2d at 330) (“Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.”); *Leatherback Sea Turtle v. Nat’l Marine Fisheries Serv.*, No. 99-00152 DAE, 1999 U.S. Dist. LEXIS 23317, at *48 (D. Haw. Oct. 18, 1999) (citing *Friends of the Earth*, 518 F.2d at 300).

Circuit are similar to the outcomes of those decided in the First Circuit.¹³⁵ Indeed, in several more recent cases, the Ninth Circuit even has recognized a definition of irreparable injury similar to that of the First Circuit.¹³⁶

Other lower federal courts, such as those of the Fourth Circuit, completely ignore the purpose of NEPA when deciding whether to order injunctive relief.¹³⁷ The Fourth Circuit, at least nominally, recognizes the harm NEPA seeks to prevent as environmental harm.¹³⁸ It also portends to recognize the harm that occurs when an agency has foreclosed the possibility of environmentally benign alternatives by investing in an environmentally damaging project before preparing an EIS.¹³⁹ While this standard seems lenient for environmental plaintiffs, in application it is not.

For example, the Fourth Circuit believes “that allowing an agency to continue work on a project while its environmental study is pending does not necessarily create the type of option-limiting harm that NEPA seeks to prevent.”¹⁴⁰ Thus, this circuit refuses to enjoin nonharmful actions, even if they are precursors to subsequent, potentially harmful actions.¹⁴¹ In *National Audubon Society v. Department of the Navy*, for instance, the Fourth Circuit declined to enjoin the Navy from purchasing land for a potential training site

¹³⁵ Compare *Friends of the Earth*, 518 F.2d at 326, with *Sierra Club v. Marsh*, 714 F. Supp. 539, 543, 546, 593 (D. Me. 1989) (enjoining construction of a causeway and resumption of harbor dredging in the area of a proposed marine dry cargo terminal due to “[a] NEPA violation which deprives agency decisionmakers of an informed awareness of significant environmental consequences of the challenged action”).

¹³⁶ See, e.g., *Bosworth*, 510 F.3d at 1034 (“[I]n the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action.” (quoting *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004)) (internal quotation marks omitted)); *Babbitt*, 241 F.3d at 738 n.18 (“[I]n *Sierra Club v. Marsh*, then-[First] Circuit Judge Breyer held that, because NEPA is a purely procedural statute, the requisite harm is the failure to follow the appropriate procedures. *Marsh* also justifies injunctive relief in this case.” (citations omitted)).

¹³⁷ See *Nat’l Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 201 (4th Cir. 2005). In addition to the Fourth Circuit, the Second Circuit ignores the purpose of NEPA when deciding whether to enjoin a federal action. See, e.g., *Town of Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) (“Broader injunctive relief is appropriate . . . where *substantial* danger to the environment, in addition to a violation of procedural requirements, is established.” (emphasis added)); *New York v. Nuclear Regulatory Comm’n*, 550 F.2d 745, 754 (2d Cir. 1977) (refusing to enjoin the air shipment of plutonium pending completion of an EIS because “the challenged shipments have been made without accident over a period of 25 years”), *superseded by rule*, Fed. R. Civ. P. 52, as recognized in *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163 (2d Cir. 2001).

¹³⁸ See *Nat’l Audubon Soc’y*, 422 F.3d at 201.

¹³⁹ See *id.*

¹⁴⁰ *Id.* at 202.

¹⁴¹ See *id.* at 201; see also *S.C. Dep’t of Wildlife & Marine Res. v. Marsh*, 866 F.2d 97, 100–01 (4th Cir. 1989) (allowing the U.S. Army Corps of Engineers to install pumped storage generators at a potential dam site prior to completion of an EIS, even though an EIS might reveal that operation of the dam would be environmentally harmful).

before completion of a supplemental EIS, claiming that this would not bias the Navy's decision regarding the location of training.¹⁴² This circuit therefore leaves to federal agencies the decision of whether to invest in projects that later may be found to degrade the environment.¹⁴³ In this regard, the Fourth Circuit reduces the issue of ordering injunctions to semantics and completely ignores the purpose of NEPA—to ensure that agencies, before making a decision, have all relevant information available to them.

To summarize, lower federal courts have adopted three distinct definitions of irreparable harm when deciding whether to issue injunctions for NEPA violations: a procedural violation of NEPA alone, a procedural violation coupled with a possible threat to the environment at any point during the agency's proposed plan, and a procedural violation along with a possibility of environmental harm resulting from the next step taken by the agency.

2. *Winter and Geertson: The Supreme Court's Evisceration of NEPA?*

Although the precise question of whether to grant equitable relief for a NEPA violation was not presented to the Supreme Court until 2008, the Court had been deciding cases about NEPA generally for many years prior.¹⁴⁴ In these cases, the Court expressed much respect for the purpose of NEPA and willingly enforced its procedures. For example, in *Kleppe v. Sierra Club*, the Court noted that NEPA “clearly states when an impact statement is required,” that “[t]he procedural duty imposed upon agencies . . . is quite precise,” and that “[a] court has no authority to depart from the statutory language.”¹⁴⁵ Similarly, in *Robertson v. Methow Valley Citizens Council*, the Court echoed Senator Jackson's statement that NEPA's procedures are “action-forcing” in

¹⁴² 422 F.3d at 181, 199.

¹⁴³ *S.C. Dep't of Wildlife & Marine Res.*, 866 F.2d at 101 (“[W]hile the potential for financial waste may prove more real than the financial savings gained by simultaneously proceeding with installation [of pumped storage generators] and environmental study, this decision is one Congress has charged the Corps with making.”). The Fourth Circuit gives this latitude to agencies, despite CEQ regulations clearly explaining that “no action concerning the proposal shall be taken which would . . . [l]imit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a) (2011). Thus, the Fourth Circuit seems to be saying that an agency does not limit its options until it takes the very last step in implementing a project.

¹⁴⁴ *See, e.g., Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (discussing whether NEPA requires agencies to consider the psychological and community effects of proposed actions); *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139 (1981) (discussing whether NEPA requires agencies to prepare “hypothetical” EISs); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (per curiam) (discussing whether a court may question an agency's decision to go forward with a proposed project when the agency fully complied with the procedural requirements of NEPA).

¹⁴⁵ 427 U.S. 390, 405–06 (1976).

that they “ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.”¹⁴⁶

However, when faced with the precise question of whether to grant equitable relief for a NEPA violation, the Supreme Court changed course. Like the Fourth Circuit, the Court showed a disregard for the purpose of NEPA when it decided *Winter v. Natural Resources Defense Council, Inc.* in 2008.¹⁴⁷ For forty years prior to this case, the Navy had been practicing the use of mid-frequency active (MFA) sonar to detect enemy submarines.¹⁴⁸ MFA sonar is the most effective way of identifying submerged diesel-electric submarines operating on battery power, three hundred of which are possessed by potential adversaries of the United States.¹⁴⁹ The Navy had chosen southern California as its training location because it was the “only area on the west coast that [wa]s relatively close to land, air, and sea bases, as well as amphibious landing areas.”¹⁵⁰ Also off the coast of southern California is the habitat of over thirty-seven marine mammals, including dolphins, sea lions, and whales.¹⁵¹ The plaintiffs in *Winter* contended that MFA sonar can inflict injuries, such as hearing loss and decompression sickness, on these animals and cause disruptions in their behavior.¹⁵² The plaintiffs also contended that “several mass strandings of marine mammals . . . have been ‘associated’ with the use of active sonar.”¹⁵³

Despite these considerations, the Navy had concluded that preparing an EIS was not necessary because its EA had revealed that only 8 “Level A harassments” and 274 “Level B harassments” of the animals might occur.¹⁵⁴ After the Navy’s EA was filed, plaintiff environmental groups brought suit, seeking an injunction of all training exercises pending the completion of an

¹⁴⁶ 490 U.S. 332, 349 (1989) (internal quotation marks omitted).

¹⁴⁷ 129 S. Ct. 365 (2008).

¹⁴⁸ *Id.* at 370.

¹⁴⁹ *Id.* at 370–71.

¹⁵⁰ *Id.* at 371.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 372. A Level A harassment was defined “as the potential destruction or loss of biological tissue (i.e., physical injury).” *Id.* In addition to discovering the potential for eight Level A harassments, the Navy’s computer models also predicted that such harassments “could be avoided through the Navy’s voluntary mitigation measures.” *Id.* A Level B harassment was defined “as temporary injury or disruption of behavioral patterns such as migration, feeding, surfacing, and breeding.” *Id.*

EIS.¹⁵⁵ The district court granted the injunction.¹⁵⁶ The Ninth Circuit affirmed but remanded the case to the district court to narrow the injunction so that the Navy could continue with its training exercises, provided that it undertook specific mitigation measures.¹⁵⁷ The district court implemented six mitigation measures, and the Navy appealed two of them.¹⁵⁸ The Ninth Circuit again affirmed, the Navy again appealed, and the Supreme Court granted certiorari.¹⁵⁹

First, the Court established that, as in other environmental cases, the traditional four-factor test for equitable relief applies in NEPA cases.¹⁶⁰ However, the Court held that the plaintiffs must show a likelihood, not a mere possibility, of irreparable injury.¹⁶¹ Thus, the Court rejected the Ninth Circuit's standard regarding whether irreparable injury is probable enough to warrant the issuance of an injunction.¹⁶²

Additionally, and implicitly rejecting the First Circuit's approach, the Court construed irreparable injury to mean harm to the environment, not the harm befalling from an agency's failure to consider all environmental ramifications of a proposed project.¹⁶³ Interestingly, the Court seemed willing to entertain contentions that harm *to humans* in the way of "scientific[] and recreational interests" could suffice as irreparable injury.¹⁶⁴ Ultimately, however, the Court determined that the plaintiffs had not made the requisite showing of irreparable

¹⁵⁵ See *id.* at 366, 373.

¹⁵⁶ *Id.* at 372.

¹⁵⁷ *Id.* at 372–73.

¹⁵⁸ *Id.* at 373. The mitigation measures included the following:

- (1) imposing a 12 nautical mile "exclusion zone" from the coastline;
- (2) using lookouts to conduct additional monitoring for marine mammals;
- (3) restricting the use of "helicopter-dipping" sonar;
- (4) limiting the use of MFA solar in geographic "choke points";
- (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and
- (6) powering down MFA sonar by [six decibels] during significant surface ducting conditions.

Id. The Navy appealed the last two listed mitigation measures. *Id.*

¹⁵⁹ *Id.* at 373–74.

¹⁶⁰ See *id.*

¹⁶¹ *Id.* at 375. The Ninth Circuit requires only that environmental plaintiffs show a possibility of environmental harm. See *supra* notes 131–36 and accompanying text.

¹⁶² See *Winter*, 129 S. Ct. at 375.

¹⁶³ *Id.* at 377 (describing "the possible harm to . . . ecological . . . interests").

¹⁶⁴ See *id.* at 377–78. For example, the Court "d[id] not question the seriousness of" the plaintiffs' declarations that they take whale watching trips, observe and take photographs of marine mammals in their natural habitats, and conduct scientific research on marine mammals. *Id.*

injury because they had shown only the possibility, and not a *likelihood*, of harm to an unknown number of marine mammals.¹⁶⁵

Even if the plaintiffs had shown irreparable injury, it would not have mattered. The Court's decision ultimately hinged upon the balancing-of-the-equities and public-interest factors.¹⁶⁶ The Court held that the Navy's interest in continuing training outweighed the plaintiffs' ecological interests because "deploy[ing] an inadequately trained antisubmarine force [would] jeopardize[] the safety of the fleet."¹⁶⁷ Therefore, the balance of the equities favored the Navy.¹⁶⁸ When examining this factor, the Court placed special emphasis on the ability of the Navy to be prepared for war.¹⁶⁹ Finally, the public interest in national security outweighed the plaintiffs' concerns.¹⁷⁰ Accordingly, to grant an injunction would be inappropriate in this case.¹⁷¹

Although the Court held irreparable injury to mean environmental harm, the Court noted, in dictum, that "[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures."¹⁷² Perhaps, then, the Navy's NEPA violations were not so egregious—the Navy was not conducting a new activity with completely unknown environmental effects.¹⁷³ Rather, the Navy had been using MFA sonar for over forty years.¹⁷⁴ One could therefore make the argument that the Navy already had all the necessary information before it, and the Court took special note of this fact.¹⁷⁵

Two years later, in *Monsanto Co. v. Geertson Seed Farms*, the Court dashed any hope that it would not continue to weaken NEPA.¹⁷⁶ The issues in *Geertson* arose over the Animal and Plant Health Inspection Service's (APHIS) decision to completely deregulate the genetically modified organism Roundup Ready Alfalfa (RRA), produced by Monsanto Company.¹⁷⁷

¹⁶⁵ See *id.* at 376, 378.

¹⁶⁶ See *id.* at 377–78.

¹⁶⁷ *Id.* at 378.

¹⁶⁸ *Id.*

¹⁶⁹ See *id.*

¹⁷⁰ *Id.*

¹⁷¹ See *id.* at 382.

¹⁷² *Id.* at 376 (emphasis added).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *id.*

¹⁷⁶ See 130 S. Ct. 2743, 2748 (2010).

¹⁷⁷ *Id.* at 2750.

Monsanto, which also produces the herbicide Roundup, had petitioned APHIS for delisting RRA under the Plant Protection Act (PPA).¹⁷⁸ APHIS granted Monsanto's request, issuing an EA and subsequently a FONSI in the process.¹⁷⁹

Environmental plaintiffs sued, claiming that APHIS should have prepared an EIS.¹⁸⁰ The district court and Ninth Circuit agreed, noting that an EIS would allow APHIS to make two necessary determinations: “[F]irst, the extent to which complete deregulation would lead to the transmission of the gene conferring glyphosphate tolerance [Roundup resistance] from RRA to organic and conventional alfalfa; and, second, the extent to which the introduction of RRA would contribute to the development of Roundup-resistant weeds.”¹⁸¹ An injunction against all future planting of RRA pending a completed EIS was issued with a temporary exception for the farmers who had relied on APHIS's deregulation in good faith.¹⁸² An injunction against any partial deregulation of RRA also was entered.¹⁸³ Monsanto appealed, and the Supreme Court granted certiorari.¹⁸⁴

In reviewing the Ninth Circuit's decision, the Supreme Court applied a slightly different four-factor test for issuing an injunction.¹⁸⁵ The Court held that

[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.¹⁸⁶

The potential effect of this different test on future cases remains unclear.¹⁸⁷

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 2750–51.

¹⁸¹ *Id.* at 2751–52.

¹⁸² *See id.* at 2751.

¹⁸³ *Id.* at 2758.

¹⁸⁴ *Id.* at 2752.

¹⁸⁵ *See id.* at 2756.

¹⁸⁶ *Id.* (quoting *eBay Inc. v. MercExchange, L. L. C.*, 547 U.S. 388, 391 (2006)).

¹⁸⁷ The Court cited its recent opinion in *eBay Inc. v. MercExchange, L. L. C.* for this new test. *Id.* (citing 547 U.S. at 391). In *eBay*, the Court claimed to use the “traditional” test. *See* 547 U.S. at 390. However, some scholars have suggested that the Court inadvertently changed the law regarding the “traditional” test for equitable relief. *See, e.g.*, Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. (forthcoming 2012) (manuscript at

Using this test, the Court vacated both injunctions entered by the Ninth Circuit.¹⁸⁸ The Court took particular issue with the injunction against any partial deregulation, claiming that the partial deregulation need not cause any irreparable injury to plaintiffs so long as its scope was sufficiently limited.¹⁸⁹ Here, the Court ignored the very language contained in the CEQ regulations that it had cited only pages earlier: actions that would “[h]ave an adverse environmental impact” or “[l]imit the choice of reasonable alternatives” may not be taken by an agency while it completes the NEPA process.¹⁹⁰

In addressing the first prong of this CEQ regulation, the Court made a tenuous argument that a partial deregulation need not harm the environment and cause irreparable injury.¹⁹¹ The Court rested its ultimate decision not to issue an injunction on this contention.¹⁹² The Court’s reasoning illustrates the difficulty environmental plaintiffs now encounter after *Winter*, which held that environmental plaintiffs must show a “likelihood” of environmental harm to demonstrate irreparable injury.¹⁹³ The district court in *Geertson* made the following factual findings: (1) planting RRA can cause genetic contamination of other crops, (2) contamination had occurred in controlled settings, (3) APHIS is unable to effectively monitor or enforce limitations on planting, and (4) “genetic contamination . . . could decimate . . . the American alfalfa market.”¹⁹⁴ However, the Court did not act in accordance with these findings,

13–14) (on file with author); Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (2007) (“Remedies specialists had never heard of the four-point test. Although one might argue that the four points can be found in *Weinberger*, the Court appears to vindicate a ‘traditional’ standard for a final injunction that never existed . . .”). On remand from the Supreme Court, the trial court of *eBay* even said, “The irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin; however, the court will address them separately in order to conform with the *four*-factor test as outlined by the Supreme Court.” *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 569 n.11 (E.D. Va. 2007).

The explicit bifurcation of the irreparable-injury and inadequacy-of-legal-remedies factors may place even more of a burden on plaintiffs to show what the Court considers irreparable injury. That is, plaintiffs must *always* show a likelihood of environmental harm, per *Winter*, in addition to inadequacy of legal remedies. Inadequacy of legal remedies is no longer enough, even though traditionally it has been.

¹⁸⁸ *Geertson Seed Farms*, 130 S. Ct. at 2756, 2762.

¹⁸⁹ *Id.* at 2760.

¹⁹⁰ *Id.* at 2750.

¹⁹¹ *See id.* at 2760.

¹⁹² *See id.* at 2760–61.

¹⁹³ *See supra* note 161 and accompanying text.

¹⁹⁴ *See Geertson Seed Farms*, 130 S. Ct. at 2762 (Stevens, J., dissenting). These factual findings also lend support to the argument that partial deregulation could bias APHIS’s complete deregulation decision. When dealing with a biological process such as genetic intermingling of plants—a mechanism that is affected by unpredictable forces, such as wind and animal transfer—a partial deregulation could lead to the same results as a complete deregulation. *See* Brief for Amici Curiae Union of Concerned Scientists et al. in Support of

instead relying on a single study within the voluminous record.¹⁹⁵ Additionally, the Court ignored the fact that RRA is the first crop engineered to resist an herbicide and known to transmit the genetically engineered gene to other plants.¹⁹⁶ By ignoring these realities, the Court turned its back on part of the reasoning employed in *Winter*, in which the Court lifted an injunction with the knowledge that the enjoined practices were not novel.¹⁹⁷

The Court did not address the second prong of the aforementioned CEQ regulations—the potential for limiting the choice of reasonable alternatives¹⁹⁸—at all. Certainly, the district court was correct in believing that any partial deregulation, even if environmentally benign, could limit APHIS’s range of available alternatives and bias the EIS that it had been ordered to complete.¹⁹⁹ For example, a partial deregulation could ease the transition to a complete deregulation and increase market demand for RRA. Therefore, if APHIS partially deregulated RRA while simultaneously completing its EIS, APHIS might be especially tempted to go through with the complete deregulation. The Supreme Court ignored this potential for agency bias and, thus, the purpose of NEPA—to ensure that agencies *objectively* examine the potential environmental consequences of their actions. In this way, the Court adopted the Fourth Circuit’s view with respect to NEPA injunctions²⁰⁰—precursors to decisions requiring an EIS may proceed, even though these actions could cause agency bias during the EIS process, thereby influencing the agency’s ultimate decision.

Geertson Respondents at 28, *Geertson Seed Farms*, 130 S. Ct. 2743 (No. 09-475) (noting the ease with which RRA’s genes may flow into wild and conventional alfalfa crops); *see also* Brief of Amici Curiae Cropp Cooperative et al. in Support of Respondents at 25, *Geertson Seed Farms*, 130 S. Ct. 2743 (No. 09-475) (noting that, “through the physical destruction of the competitive products through contamination,” “the unregulated release of RRA would result in loss of farmers’ chosen livelihood of organic farming”).

¹⁹⁵ *See Geertson Seed Farms*, 130 S. Ct. at 2770 (Stevens, J., dissenting). The Court’s opinion also failed to consider other disturbing consequences of RRA use. *See, e.g.*, CHARLES BENBROOK, ORGANIC CTR., IMPACTS OF GENETICALLY ENGINEERED CROPS ON PESTICIDE USE: THE FIRST THIRTEEN YEARS 3 (2009) (describing how genetically engineered crops have been responsible for an increase in pesticide use); William Neuman & Andrew Pollack, *Rise of the Superweeds*, N.Y. TIMES, May 4, 2010, at B1 (explaining how the use of Roundup-resistant crops leads to the creations of “superweeds” resistant to conventional pesticides); Lucia Graves, *Roundup Birth Defects: Regulators Knew World’s Best-Selling Herbicide Causes Problems*, *New Report Finds*, HUFFINGTON POST (Aug. 7, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/06/07/roundup-birth-defects-herbicide-regulators_n_872862.html (explaining Earth Open Source’s finding that industry regulators have known since 1980 that Roundup causes birth defects).

¹⁹⁶ *See Geertson Seed Farms*, 130 S. Ct. at 2762 (Stevens, J., dissenting).

¹⁹⁷ *See id.* at 2768.

¹⁹⁸ *See supra* note 55 and accompanying text.

¹⁹⁹ *See Geertson Seed Farms*, 130 S. Ct. at 2762 (Stevens, J., dissenting).

²⁰⁰ *See supra* notes 137–43 and accompanying text.

These two cases—*Winter* and, especially, *Geertson*—represent the Supreme Court’s reluctance to issue injunctions for NEPA violations and, consequently, represent a potential weakening of the Act. NEPA consists solely of procedural requirements, and its purpose is to make agencies aware of the potential environmental ramifications of their actions. Injunctive relief requires agencies to complete an EIS before reaching a decision. Thus, by refusing to issue injunctions, the Court is undermining the purpose of NEPA.

III. WHY *WINTER* AND *GEERTSON* ARE NOT THE END OF NEPA

This Part explains how the holdings of *Winter* and *Geertson* can be limited to their unique facts. Because of these unique facts, the approach federal courts should take when confronted with a more typical NEPA case remains unclear. Thus, this Part clarifies what the framework for this type of case should be by attempting to harmonize *Winter* and *Geertson* with the Court’s well-established precedent in this area of the law. Specifically, this Comment argues that a showing of likely environmental harm is superfluous and proposes that irreparable harm be presumed when an agency violates NEPA’s procedures. This presumption of irreparable harm necessarily would lead to injunctive relief being granted more readily.

A. *How to Limit Winter and Geertson in the Future*

If read expansively, *Winter* and *Geertson* have raised the bar for environmental plaintiffs by requiring a *likelihood* of environmental harm in all NEPA cases. However, in neither case did the Supreme Court declare that it was changing prevailing law. Thus, the holdings of these cases should be limited in the future.

When interpreting *Winter*, federal courts should remember that the Court’s perspective can be summed up by the first line of Chief Justice Roberts’s opinion: “To be prepared for war is one of the most effectual means of preserving peace.”²⁰¹ *Winter* involved training practices imperative to the Navy’s preparedness and the nation’s security.²⁰² So, while injunctions

²⁰¹ *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 370 (2008) (quoting George Washington, President, First Annual Address (Jan. 8, 1790), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 65, 65 (James D. Richardson ed., Bureau of Nat’l Literature & Art 1908) (1897)) (internal quotation marks omitted).

²⁰² See Joel R. Reynolds et al., *No Whale of a Tale: Legal Implications of Winter v. NRDC*, 36 *ECOLOGY L.Q.* 753, 769–70 (2009) (“*Winter* stands for the narrow proposition that an injunction found to ‘jeopardiz[e]

normally may issue for a violation of NEPA, when an extreme circumstance presents itself, as in *Winter*, an injunction would be inappropriate. This is not to say that an injunction is *presumed* to issue in a NEPA case. Rather, descriptively speaking, injunctions may be found proper in the vast majority of cases exhibiting more typical facts. Further support for this conclusion is found in the Court's reiteration in the final paragraph of its opinion that it "[d]id not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals."²⁰³ Rather, these interests were merely outweighed.²⁰⁴ Thus, given normal circumstances, the plaintiffs' interests may have warranted an injunction. Additionally, *Winter* stands for the notion that only a *crucial* military practice may outweigh environmental concerns.²⁰⁵

On a related note, *Winter* highlights the Court's duty to defer to the military when dealing with an issue such as national security.²⁰⁶ Even if the Court had not viewed national security interests as trumping environmental interests, it still must have given great weight to the military's assertions that MFA sonar is absolutely necessary to the training of soldiers.²⁰⁷ This is why, in its opinion, the Court repeatedly stressed that it was acting in accordance with declarations of the Navy's most senior officers, as well as a determination made by the President that MFA sonar was "essential."²⁰⁸ This does not mean a federal court should defer to *any* agency's declaration just because that agency has more subject-matter expertise and experience than the court.²⁰⁹ Instead, *Winter* stands for the more narrow proposition that, in an area where the Executive Branch traditionally exercises vast amounts of power, such as providing for the

national security' should not issue when there is insufficient evidence of harm to the environment." (alteration in original)).

²⁰³ *Winter*, 129 S. Ct. at 382.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 378 ("Of course, military interests do not always trump other considerations, and we have not held that they do.").

²⁰⁶ *See id.* at 377.

²⁰⁷ *See id.* ("We 'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.'" (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986))).

²⁰⁸ *Id.* at 373, 377–80.

²⁰⁹ It may seem like a logical extension of *Winter* to claim that all agencies warrant great deference in NEPA violation cases. *See* Reply Brief for the Federal Respondents Supporting Petitioners at 14, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2643 (2010) (No. 09-475). But once logically extended, this argument's flaw becomes apparent. For example, it is untrue to say that a federal court must defer to APHIS's (hypothetical) declaration that deregulation of RRA is so imperative that an injunction against the action would cause some sort of national crisis that is comparable to the Navy being unable to defend the country.

national defense, a court may be required to defer to the judgments of that branch.

Similarly, *Geertson* can be limited to its unique facts. In this opinion, the Supreme Court devoted much space to a hypothetical partial deregulation it thought (perhaps mistakenly) would not lead to the environmental damage of which plaintiffs were wary.²¹⁰ The Court listed several limitations that APHIS might impose on farmers seeking to take advantage of this hypothetical partial deregulation.²¹¹ In reality, however, APHIS never before had granted partial approval of a petition for nonregulated status.²¹² Thus, it was unclear what exact mechanism APHIS actually would employ to effectuate this sort of partial deregulation.²¹³ In his dissent, Justice Stevens speculated that this partial deregulation would be pursuant to the PPA's current case-specific permit process or a proposed new PPA "special case[]" system of deregulation subject to agency oversight.²¹⁴ Either way, the partial deregulation would be subject to a *substantive* environmental regulation.²¹⁵ Thus, *Geertson* can be limited by the fact that additional protection would be provided through substantive requirements separate from the NEPA process. While all agency actions invariably will be governed by some sort of substantive law or regulation, and many will be addressed by a substantive environmental law, some will not be addressed by a substantive environmental law relevant to environmental plaintiffs' concerns. The latter group of agency actions therefore can be distinguished from the circumstances of *Geertson*.

²¹⁰ See *Geertson*, 130 S. Ct. at 2760.

²¹¹ *Id.*

²¹² See *id.*

²¹³ See *id.* at 2768 n.6 (Stevens, J., dissenting).

²¹⁴ *Id.* (internal quotation marks omitted); *accord id.* at 2767 n.6 ("One of the many matters not briefed in this case is how limited a partial deregulation can be. It is not clear whether the sort of extremely limited 'partial deregulations' envisioned by the Court, in which RRA is 'deregulated' in one small geographic area pursuant to stringent restrictions, could be achieved only through 'partial deregulation' actions, or whether they could also (or exclusively) be achieved through a more case-specific permit process." (citation omitted)).

²¹⁵ See 7 C.F.R. § 340.4(b)(10)–(12) (2011) (describing the current permit process, which requires "[a] detailed description of the processes, procedures, and safeguards which have been used or will be used in the country of origin and in the United States to prevent contamination, release, and dissemination . . . [and] a detailed description of the proposed procedures, processes, and safeguards which will be used to prevent escape and dissemination of the regulated article at each of the intended destinations"); see also Introduction of Organisms and Products Altered or Produced Through Genetic Engineering, 72 Fed. Reg. 39,021, 39,022, 39,024 (July 17, 2007) (to be codified at 7 C.F.R. pt. 340) ("The [proposed] new system could include processes and criteria to allow release and use, with some restrictions, for special cases where there were minor risks that could be mitigated with conditions to ensure safe commercial use."). Additionally, the proposed "special-case" deregulation scheme has been subjected to its own NEPA process. See generally *id.* at 39,022–25.

If read expansively, *Winter* and *Geertson* will significantly weaken NEPA. However, because of the unique facts described above, these were not typical NEPA cases. Therefore, the holdings of these cases can be limited. Indeed, these holdings *must* be limited to harmonize them with the enacting Congress's vision of NEPA, *Romero-Barcelo* and *Amoco Production Co.*, and the Court's precedent regarding NEPA. The question remains: What is the appropriate framework for a typical NEPA case?

B. How to Harmonize Winter and Geertson with Precedent and the Purpose of NEPA

Federal courts should read *Winter* and *Geertson* narrowly so as to harmonize their holdings with the enacting Congress's vision of NEPA, as well as the Supreme Court's precedent.²¹⁶ The Court never said in *Winter* or in *Geertson* that it was changing prevailing law. Instead, these cases presented unique circumstances—national security considerations in *Winter* and the additional protection of a substantive environmental law in *Geertson*—and do not represent the approach that should be used in a typical NEPA case. So what is the appropriate framework? Just as in *Romero-Barcelo* and *Amoco Production Co.*, federal courts should look to the purpose of the statute at hand when deciding whether to issue injunctions for NEPA violations.²¹⁷ Taking NEPA's purpose to heart means NEPA will retain force in the future.

Although some commentators disagree,²¹⁸ considering the purpose of NEPA is not a vague undertaking. The First Circuit got it right when it said

²¹⁶ Some lower federal courts' recent trademark decisions have followed the approach espoused in *Romero-Barcelo* and *Amoco Production Co.*, and therefore may be declining to read *Winter* expansively. See Thomas M. Williams, *Winter v. NRDC: A Stricter Standard for Irreparable Harm in Trademark Cases?*, 91 J. PAT. & TRADEMARK OFF. SOC'Y 571, 574–76 (2009). Prior to *Winter*, trademark plaintiffs enjoyed a presumption of irreparable injury, "even absent a showing of business loss." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992). Even after *Winter*, in *Garcoa, Inc. v. PH Beauty Labs, Inc.*, the Ninth Circuit held that courts may continue to presume irreparable injury in trademark cases "because trademark damages are, by their very nature, irreparable." No. CV 09-4859 AHM (Ex), 2009 WL 2489223, at *2 (C.D. Cal. Aug. 10, 2009).

²¹⁷ The notion that a court should look to the purpose of the relevant statute when granting equitable relief is not limited to environmental cases. See Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1356 (2000) ("There seems to be no way to decide how to characterize injuries without looking at the harms that the underlying legal provision is aimed to prevent.").

²¹⁸ See, e.g., Avalyn Taylor, *Rethinking the Irreparable Harm Factor in Wildlife Mortality Cases*, 2 STAN. J. ANIMAL L. & POL'Y 113, 139 (2009) ("[U]nlike the [Endangered Species Act] and [the Marine Mammal Protection Act], in which the primary harms the statutes intend to prohibit are relatively easy to identify, defining the scope and nature of the primary harm to be considered under NEPA is much more challenging. This is largely because the 'primary goals' of the statute are very broad . . .").

NEPA exists to influence agencies' decision-making processes.²¹⁹ The Act's procedural mandates, rather than any substantive provisions, are essential to that purpose.²²⁰ Accordingly, there should be a rebuttable presumption of irreparable injury when an agency has violated NEPA's procedures. An injury is suffered by the public, and thus environmental plaintiffs, when an agency initiates a proposed action without considering its environmental effects. The injury lies in harm to the informed decision-making process envisioned by NEPA's enacting Congress. A showing of likely environmental harm is superfluous. Defining irreparable injury as a procedural violation would be ideal because it would (1) put environmental plaintiffs' burden of proof at a proper level, (2) appropriately broaden the scope of relief granted for NEPA violations, (3) provide clarity for courts and parties alike, and most importantly, (4) help ensure that EISs are completed at the proper time.

First, requiring plaintiffs to show only a NEPA violation, rather than likely environmental harm, would set plaintiffs' burden of proof at a reasonable level. The end goal of an EIS is to discover the very environmental harm that the Supreme Court currently requires environmental plaintiffs to show. An agency's use of its own expertise and resources, through completion of an EIS, is sometimes the only way to show with any certainty (or, more accurately, with the degree of certainty currently required by the Court) the potential for environmental degradation, especially when a novel practice with unknown effects is at issue. In such circumstances, requiring plaintiffs to make a showing of environmental harm forces them to perform what actually is the

²¹⁹ See, e.g., *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

²²⁰ See COUNCIL ON ENVTL. QUALITY, *supra* note 21, at 37 (describing the "[p]rocedural mandate" of NEPA as a federal agency's duty "to use a planning and decision-making process for developing or considering the approval of plans, policies, programs or projects that gives 'appropriate consideration to environmental values and amenities,' which occurs mainly through the analysis of environmental impacts and alternatives, including mitigation measures").

agency's task²²¹—a task requiring resources and expertise that persons outside of the agency often do not have.²²²

Recognizing irreparable injury as a violation of NEPA's procedures is important to set environmental plaintiffs' burden of proof at an appropriate level in another way as well. The irreparable-injury factor is the *sine qua non* of injunctive relief in that most courts require a showing of irreparable harm before moving on to the other factors.²²³ In this way, it acts as an initial threshold that plaintiffs must overcome. Therefore, using the Supreme Court's standard for irreparable injury—a likelihood of harm to the environment—can create an insurmountable barrier for environmental plaintiffs in a typical NEPA case.

Geertson illustrates the type of unfortunate result that may occur when the standard for irreparable injury, the initial threshold that must be met for injunctive relief, is too high.²²⁴ By finding that irreparable injury was not present in *Geertson*, the Supreme Court avoided the necessity of analyzing whether the injunction would benefit the public interest, as well as the balance of the equities. The scale would have tipped in favor of enjoining partial deregulation, given the significant public interest in avoiding potential disastrous consequences, such as contamination of organic and conventional alfalfa crops.²²⁵ If organic or conventional crops were to become contaminated, farmers of these crops would lose sales domestically.²²⁶ Also, exports of these

²²¹ See *Ctr. for Food Safety v. Vilsack*, 753 F. Supp. 2d 1051, 1056 (N.D. Cal. 2010) (“[Monsanto and APHIS] are seeking to penalize Plaintiffs, as well as the environment, because the precise effects from these plantings are not yet known. However, ‘this lack of precision is the result of [APHIS’s] failure to conduct an environmental evaluation *prior* to’ issuing these permits.” (second alteration in original) (quoting *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009)), *vacated*, 636 F.3d 1166 (9th Cir. 2011); see also Memorandum from Nancy H. Sutley, Chair, Council on Env’tl. Quality, to the Heads of Fed. Dep’ts & Agencies 7 (Feb. 18, 2010) [hereinafter Memorandum from Nancy H. Sutley], *available at* www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf (noting that the “likelihood of [the] future condition” is the very thing an EIS’s discussion of climate change seeks to determine).

²²² See DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL § 5.03(3)(a), at 5-21 (2006) (“[I]rreparable injury, the key factor in prayers for interlocutory relief, is either difficult or extremely costly to prove.”).

²²³ Taylor, *supra* note 218, at 115 (citing RIESEL, *supra* note 222).

²²⁴ See *supra* notes 176–200 and accompanying text.

²²⁵ See Voosen, *supra* note 4 (“‘[T]his talk about science and science based-analysis on the part of proponents of GM crops is very misleading,’ [said University of Arkansas agricultural law professor Susan Schneider]. ‘The science is that we cannot contain GM crops without *significant* restrictions. The policy issue—the real issue here—is whether we care.’” (emphasis added)). Even with restrictions in place, there is no guarantee of the complete absence of Roundup Ready genes in organic and conventional alfalfa. *Id.*

²²⁶ See Pollack, *supra* note 4.

organic or conventional crops to certain countries would be jeopardized by the possible detection of genetically engineered material.²²⁷

Additionally, in *Geertson*, the district court already had balanced the harms fairly because its injunction made a temporary exception for farmers who had relied in good faith on APHIS's deregulation.²²⁸ The Court cited no reason why Monsanto would be harmed by the temporary injunction of partial deregulation.²²⁹ If an injunction had been issued, Monsanto merely would have had to wait until an EIS was prepared. Comparing this inconvenience with the harm that could occur to organic and conventional farmers speaks for itself. If the Supreme Court had been required to investigate the other factors—as a result of a lower standard for the threshold factor of irreparable injury—the Court's decision may have been different. Thus, to avoid unfortunate outcomes similar to the outcome of *Geertson*, the threshold factor of irreparable injury should be presumed when an agency violates NEPA's procedures.

Second, allowing a procedural violation to suffice as irreparable injury would appropriately broaden the scope of scenarios for which courts can grant relief. NEPA is triggered by actions “significantly affecting” the environment.²³⁰ The CEQ regulations interpret the word “[a]ffecting” to mean “will or may have an effect on.”²³¹ The inclusion of “may” captures the notion that an EIS serves to shed light on effects that may be speculative but nonetheless important to consider.²³² Adverse environmental effects do not have to be likely for an agency to be beholden to NEPA's procedures. If NEPA were triggered only by a “likelihood” of specific effects resulting from an agency action, then it would make sense to require environmental plaintiffs to show this potentiality as well. But because the degree of certainty that the CEQ requires to trigger NEPA is less than the degree of certainty that the Court requires of plaintiffs attempting to demonstrate irreparable injury, the Court's jurisprudence inappropriately narrows the scope of relief available under NEPA.

²²⁷ *Id.*

²²⁸ *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2751 (2010).

²²⁹ *See supra* notes 176–200 and accompanying text.

²³⁰ National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C) (2006).

²³¹ 40 C.F.R. § 1508.3 (2011).

²³² *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732 (9th Cir. 2001) (“Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data”); *see also* 40 C.F.R. § 1508.27(b)(5) (noting that an agency must state in its EIS “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks”).

The issue of climate change provides a relevant example of circumstances that could trigger the NEPA process under the CEQ guidelines but might not create the likelihood of environmental harm demanded by the Supreme Court for an injunction. While it is not settled law that an agency must consider climate-change-related effects in an EIS, federal courts are increasingly expecting thorough analysis of such effects.²³³ Additionally, the CEQ recently released draft guidance explaining when and how agencies should address the effects of greenhouse gases in their EISs.²³⁴ The CEQ suggested that “important” but “significant[ly] uncertain[]” climate change effects should be considered.²³⁵ The CEQ listed the “approval of a large solid waste landfill; approval of energy facilities such as a coal-fired power plant; or authorization of a methane venting coal mine” as examples of instances when an agency should discuss climate change effects.²³⁶

The CEQ recognized in its guidance that it “is difficult to isolate and to understand” the link between a particular project and “specific climatological changes.”²³⁷ It is similarly difficult to link climatological changes to specific environmental harms.²³⁸ Furthermore, climate change is not caused by any single agency action but rather the cumulative impacts of many dispersed—in both time and geography—actions. Thus, one can imagine the difficulty environmental plaintiffs would encounter when attempting to prove that a specific project presents a “likelihood” of harm to the environment in the way of climatological effects. The tension between NEPA’s broad coverage and the Court’s high standard for environmental plaintiffs is clear.

Third, and more practically, requiring only a showing of a NEPA violation would lead to less confusion for plaintiffs, defendants, and courts alike. At least one scholar has argued that, when considering a request for injunctive relief, “courts should consider whether the action plaintiffs seek to enjoin

²³³ See, e.g., *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 550 (9th Cir. 2007) (“The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”), *vacated and withdrawn on denial of reh’g*, 538 F.3d 1172 (9th Cir. 2008); *Border Power Plant Working Grp. v. Dep’t of Energy*, 260 F. Supp. 2d 997, 1028–29 (S.D. Cal. 2003) (holding an EA to be inadequate because of its failure to thoroughly assess the effects of carbon dioxide emissions from a natural gas turbine).

²³⁴ Memorandum from Nancy H. Sutley, *supra* note 221, at 1, 4–5.

²³⁵ *Id.* at 7.

²³⁶ *Id.* at 3.

²³⁷ *Id.*

²³⁸ See *id.* at 10 (“Nearly every aspect of energy choices and use affect the development of fossil fuel and other energy resources, either adding to or reducing the cumulative total of [greenhouse gas] emissions.”).

would cause irreparable harm to any of the interests protected by NEPA's primary goals, including the natural environment, human health and welfare, and efforts to promote the 'productive and enjoyable harmony' between the two."²³⁹ But this type of vague standard would be much more difficult to apply than a presumptive rule such as the one proposed in this Comment. It is not that a court cannot consider important yet nebulous values, such as harmony between the environment and humans; rather, these should come into play when addressing the balance-of-the-equities and the public-interest factors.²⁴⁰ A presumption of irreparable injury would send a signal to defendants and courts that procedural violations of NEPA must be taken seriously.

The fourth and final reason why irreparable injury should be presumed from a violation of NEPA's procedures involves the crucial temporal aspect of NEPA. That is, an EIS must be completed along the proper timeline to ensure the agency knows all the potential environmental ramifications of its proposed action *before* it decides whether to initiate that action. A procedural violation of NEPA, even absent the likelihood of environmental harm required by the Supreme Court, undermines this important facet of NEPA and thus should suffice as irreparable injury.

An example helps illustrate this point. One could argue that, in *Geertson*, the Court erred by vacating the injunction against any and all partial deregulation of RRA.²⁴¹ That injunction was within the Court's discretion²⁴² and necessary—even if a partial deregulation may result in *zero* environmental harm—to ensure that APHIS's decision upon completion of its EIS would not be biased. It is easy for one to imagine a scenario in which a preliminary partial deregulation could cause APHIS to decide to completely deregulate RRA, even though its EIS revealed that significant environmental harm would ensue from complete deregulation. For instance, as a result of partial

²³⁹ Taylor, *supra* note 218, at 139 (quoting 42 U.S.C. § 4321 (2006)).

²⁴⁰ *Id.* at 141 (noting how the public-interest factor operates as a "'check' on a finding of irreparable harm").

²⁴¹ See *supra* notes 188–89 and accompanying text.

²⁴² Brief of Amici Curiae Dinah Bear et al. in Support of Respondents at 12, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (No. 09–475) [hereinafter Brief of Amici Curiae Dinah Bear et al.] (citing *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (1985)) ("A court is well within its equitable discretion to enjoin an unprecedented activity from proceeding until after a proper environmental analysis, required by statute, has been conducted."). By way of comparison, Congress has explicitly stated in other statutes that a procedural violation should not be the basis for an injunction. See, e.g., 2 U.S.C. §§ 1531, 1571(a)(3) (2006) (stating that "the inadequacy or failure to prepare" the requisite written statement, describing "the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector," "shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule").

deregulation, farmers may begin to rely on the availability of RRA, thereby increasing demand for the product and creating a market that APHIS later would be tempted to expand via a complete deregulation.

Perhaps then-Circuit Judge Breyer explained this phenomenon of “bureaucratic momentum”²⁴³ best:

[A]s time goes on, it will become ever more difficult to undo an improper decision (a decision that, in the presence of adequate environmental information, might have come out differently). The relevant agencies and the relevant interest groups (suppliers, workers, potential customers, local officials, neighborhoods) may become ever more committed to the action initially chosen. They may become ever more reluctant to spend the ever greater amounts of time, energy and money that would be needed to undo the earlier action and to embark upon a new and different course of action. . . . Given the realities, the farther along the initially chosen path the agency has trod, the more likely it becomes that any later effort to bring about a new choice, simply by asking the agency administrator to read some new document, will prove an exercise in futility.²⁴⁴

This reality supports the argument that a violation of NEPA’s procedures should create a presumption of irreparable injury. Even if a preliminary step taken by the agency may not harm the environment, it still could bias the agency’s decision-making process. This potential for bias should be avoided because environmentally benign, preliminary actions frequently lead to environmentally harmful actions.²⁴⁵

The CEQ’s regulations explicitly limit the actions an agency may take while completing an EIS. An agency, prior to EIS completion, shall take no action that would “[l]imit the choice of reasonable alternatives”²⁴⁶ or “determine subsequent development.”²⁴⁷ Thus, in the NEPA context, an injunction against preliminary steps is less like “an extraordinary remedy.”²⁴⁸

²⁴³ *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (“Bureaucratic rationalization and bureaucratic momentum are real dangers, to be anticipated and avoided . . .”).

²⁴⁴ *Sierra Club v. Marsh*, 872 F.2d 497, 503 (1st Cir. 1989).

²⁴⁵ *See Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 326 (9th Cir. 1975) (intimating that the environmentally harmless actions of approving and committing federal funds for airport development projects might ultimately lead to environmentally damaging construction).

²⁴⁶ 40 C.F.R. § 1506.1(a)(2) (2011).

²⁴⁷ *Id.* § 1506.1(c)(3).

²⁴⁸ *See Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008) (citing *Munaf v. Geren*, 128 S. Ct. 2207, 2218–19 (2008)).

Instead, it simply requires federal agencies to do what already is required of them under NEPA—wait until they have all the relevant information regarding a proposed action. If this information shows that the proposed action does not significantly threaten the environment and that a preliminary step taken by the agency would have been environmentally benign, so be it. The point is that NEPA’s enacting Congress thought the agency must know this information before making a decision²⁴⁹ because there are many situations in which the proposed action *does* pose a risk to the environment. Allowing an agency to proceed with any sort of preliminary decision prior to completion of an EIS directly contravenes the purpose of NEPA²⁵⁰ and does little to prevent agencies from prematurely devoting time, resources, and energy to a proposed action.

Importantly, the notion that a court should invoke its equitable powers to address a procedural violation in the absence of any substantive harm is not an entirely novel idea and squares with the Supreme Court’s accepted jurisprudence in other areas of the law.²⁵¹ For example, in *Clark v. Roemer*, the preclearance provisions in section 5 of the Voting Rights Act had been violated, yet a district court allowed an election to go forward anyway.²⁵² The Supreme Court reversed without even asking whether the procedural violation at issue had led to any sort of tangible harm.²⁵³ The procedural provisions of NEPA warrant the same deference.

The analysis of irreparable injury proposed here—that irreparable injury be presumed when an agency has violated NEPA’s procedures—also comports with the traditional understanding of equitable relief. Traditionally, injury has been considered irreparable when the plaintiff could not use monetary damages to replace the specific thing she lost.²⁵⁴ The loss of the benefits resulting from an agency’s informed decision-making process cannot be remedied with

²⁴⁹ See *supra* notes 24–25 and accompanying text.

²⁵⁰ Brief of Amici Curiae Dinah Bear et al., *supra* note 242, at 20 (“The difference in timing between [the injunction that the district court adopted and the injunction APHIS proposed] is the difference between enforcing and not enforcing NEPA’s objectives, where the unanalyzed activity threatened environmental injury.”).

²⁵¹ Brief for Amici Curiae Natural Resources Defense Council et al. in Support of Respondents at 33, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (No. 09-475).

²⁵² 500 U.S. 646, 650 (1991).

²⁵³ *Id.* at 655, 660.

²⁵⁴ See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 37 (1991) (noting that the inadequacy of legal remedies “is by far the most important source of irreparable injury”); ELAINE W. SHOBNEN ET AL., *REMEDIES: CASES AND PROBLEMS* 52 (3d ed. 2002) (noting that the requirement of irreparable injury “is usually just an alternative phrasing of the inadequacy rule; the harm is irreparable because the damage remedy is inadequate”).

damages.²⁵⁵ While actual environmental harm cannot be remedied by damages either, harm to the informed decision-making process envisioned by NEPA's enacting Congress suffices. Because irreparable injury traditionally has been equated with inadequacy of legal remedies, it makes sense that courts have the power to deny a request for an injunction even when irreparable injury is found.²⁵⁶ Otherwise, a court would be required to issue an injunction solely due to the inadequacy of legal remedies, and this would lead to undesirable results in many cases. Accordingly, courts are still able to exercise discretion vis-à-vis the balancing-of-the-equities and public-interest factors, even when irreparable injury is present. Therefore, absurd results will be avoided.

As argued above, *Winter* and *Geertson* should be read narrowly so as to harmonize with the enacting Congress's vision of NEPA and the Supreme Court's precedent. Specifically, these two cases should not be interpreted as espousing the typical approach to the question of whether an injunction should issue in a NEPA case. Rather, in the typical NEPA case, irreparable injury should be presumed when an agency has violated the Act's procedures. This presumption is warranted given that NEPA's procedures are the only way to effectuate the Act's purpose—informed and impartial agency decision making. Additionally, a presumption of irreparable injury would be ideal for the following reasons: it would (1) put environmental plaintiffs' burden of proof at a proper level, (2) appropriately broaden the scope of relief granted for NEPA violations, (3) provide clarity for courts and parties alike, and most importantly, (4) help ensure that agencies complete an EIS at the proper time.

CONCLUSION

If read expansively, the Supreme Court's recent decisions in *Winter* and *Geertson* mark the beginning of an unfortunate path toward removing the only teeth NEPA has—its procedural mandates. By requiring a showing of likely environmental harm to meet the irreparable-injury requirement of injunctive relief, the Court significantly raised the burden of proof for environmental plaintiffs. But the holdings in *Winter* and *Geertson* can, and should, be limited to their unique facts. These cases should be read narrowly to harmonize with

²⁵⁵ LAYCOCK, *supra* note 254, at 41 (noting that a damage award cannot “replace . . . the cautionary effects of an environmental impact statement”).

²⁵⁶ See SHOEN ET AL., *supra* note 254, at 59, 69 (noting that “[a] judge may appropriately weigh the relative hardships of the parties in the matter” when “deciding whether to issue an injunction at all” and that “[t]he public interest affects the decision whether to grant an equitable remedy”); *id.* at 62 (“A plaintiff is not entitled to an injunction simply upon proof that . . . the harm is great and irreparable.”).

the enacting Congress's vision of NEPA, as well as the Court's precedent in this area of the law. Specifically, *Winter* and *Geertson* should be read to comport with *Romero-Barcelo* and *Amoco Production Co*, which suggest that courts should consider the purpose of the statute at hand when deciding whether to issue injunctions.

The purpose of NEPA is to ensure informed and impartial agency decision making, and the Act's procedures provide the only means to reach this end. Accordingly, irreparable injury should be presumed when an agency has violated NEPA's procedures. A showing of likely environmental harm is superfluous. This presumption of irreparable injury would (1) put environmental plaintiffs' burden of proof at a proper level, (2) appropriately broaden the scope of relief granted for NEPA violations, (3) provide clarity for courts and parties alike, and most importantly, (4) help ensure that agencies complete an EIS at the proper time. Ultimately, this framework would signal to courts the importance of judicial review as a NEPA enforcement mechanism and force agencies to take their obligations under NEPA seriously.

MADLINE GWYN*

* Notes and Comments Editor, *Emory Law Journal*; J.D. Candidate, Emory University School of Law (2012); B.A., University of North Carolina at Chapel Hill (2009). First and foremost, I thank Professor William Buzbee for providing absolutely invaluable insight, guidance, and most importantly, encouragement throughout the process of writing this Comment. I also thank Alan White, Rob Ellis, and Gina von Sternberg for their helpful feedback on previous drafts of this Comment. Finally, I thank the entirety of the *Emory Law Journal* Editorial Board. In particular, I am grateful to Amy Dehnel and Daniel Reach for their thoughtful suggestions and scrupulous edits.